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No. 06-1068

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of *certiorari* remains accurate.

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REPLY BRIEF FOR PETITIONER

This case presents important, recurring questions regarding Due Process Clause restraints on punitive damages. Respondents have virtually nothing to say to refute the certworthiness of these issues, so they devote their opposition largely to misstating and distorting the record and the applicable court rules. But the record here could not be clearer: At every level, Ford advanced due process challenges to both liability for and the amount of punitive damages, and the court of appeal's decision contains detailed and express analysis rejecting Ford's arguments. These issues, therefore, are not only preserved, but ripe for this Court's resolution.

As Ford's Supplemental Brief shows, *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057 (2007), strongly supports Ford's arguments on all three questions presented and, at the least, requires vacatur and remand. Indeed, respondents' lengthy, belabored efforts to explain away *Philip Morris* confirm that there is easily "a reasonable probability that the decision below rests [on] premise[s] that the lower would reject if given the opportunity for further consideration" in light of *Philip Morris*. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

A. Question 1—Vague Standards Governing Punitive Damage Liability In Product Design Cases.

1. Respondents' waiver arguments are utterly baseless. Respondents concede that Ford expressly raised its as-applied vagueness challenge to California's punitive damage liability standards in the court of appeal, Opp. 5, and that court expressly decided it. Pet. App. 50a-51a. Respondents nonetheless assert that Ford "did not present it properly to the California Supreme Court in its Petition For Review" and "[t]he issue appears only in a footnote." Opp. 5. But this is manifestly false. Indeed, it was a principal theme of Ford's petition, which expressly raised it in the *very first paragraph*:

> Unless reviewed and overturned, that decision will render it irrelevant that a manufacturer's design decisions resulted in a product that complies with industry standards and custom, comports with relevant federal safety standards and reasonable policy judgments, and performs as well or better than comparable competing products. In place of these knowable standards, the decision substitutes a *vague regime* that will permit tens of millions of dollars of punishments to be imposed if a jury deems a manufacturer's conduct "despicable" on the strength of nothing more than a finding that, as will almost always be the case, the product might possibly have been made "safer" if more money had been spent in making it. That is neither constitutional nor rational. Review is necessary to conform California's product liability and punitive damage law to reason, common sense, and the United States Constitution.

Reply Appendix ("Reply App.") 3a (emphasis added).

Ford's petition expressly sought Supreme Court review in part because the appellate court's interpretation of California law was unconstitutional. Ford argued that the court below had "held that juries are authorized to deem a manufacturer's design decisions malicious, and impose severe punishment, even where undisputed, objective indicators . . . affirmatively refute malice as a matter of law. This ruling contradicts . . . due process. This issue is especially important because punitive damages 'pose an acute danger of arbitrary deprivation of property.'" Reply App. 5a (quoting *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417-18 (2003)). Further: "[T]he Court of Appeal's interpretation . . . renders it *unconstitutionally vague* as applied in this case, both because Ford did not have notice sufficient to tailor its conduct to avoid punishment and because of the risk of arbitrary and discriminatory enforcement." Reply App. 11a n.2 (emphasis added) (citing, *e.g.*, *City of Chicago* v.

Morales, 527 U.S. 41, 56 (1999)). Thus, Ford easily satisfied California's rules, which merely require that an issue be "fairly included" in those presented for review.[1]

2. Respondents' other claims are equally misguided. Respondents deny that the court of appeal held that objective referents, such as industry custom, were "irrelevant" to punitive damages, arguing that the decision allows juries to consider them. Opp. 10-11. The court, however, not only held that "compliance with industry . . . custom was irrelevant . . . to punitive damages," Pet. App. 23a, but also that "admission of such evidence is reversible error." *Id.* 22a. More fundamentally, respondents seem to miss entirely the point that the thrust of Ford's argument is that California law improperly permits juries to engage in standardless, subjective, and ad hoc policy judgments that ignore all objective factors that might otherwise give manufacturers "fair notice," contrary to *State Farm* and *Philip Morris*. *See* Pet. 11-18; Supp Br. 1-3; *see also* AAM/NAM Br. 10-18; PLAC Br. 5-10.[2]

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[1] The California Supreme Court has broad power to "decide any issues that are raised or fairly included in the petition," Cal.R.Ct. 8.516(b), and applies this prudential criterion liberally. *See People* v. *Snyder*, 22 Cal. 4th 304, 310-11 (2000) (though not raised below, question whether, in view of constitutional and statutory constraints, Legislature had power to enact statute as interpreted below was "fairly included" in issue whether lower court's interpretation was correct). It may even consider issues "neither raised nor fairly included in the petition." Cal.R.Ct. 8.516(b)(2). Respondents' reliance (Opp. 5) on cases like *Beck* v. *Washington*, 369 U.S. 541 (1962), is therefore wholly misplaced. *See id.* at 550-553 (issue precluded where "unbroken line of precedent" showed state supreme court "has *unfailingly refused* to consider constitutional attacks upon statutes not made in the trial court" and petitioner failed to adhere to categorical appellate court rule requiring that errors "be definitely pointed out in the 'assignments of error' in appellant's brief") (emphasis added).

[2] Respondents falsely claim Ford argued the relevance of objective standards only "*as a matter of California law*." Opp. 11 (original emphasis). Ford's opening brief had *an entire section* showing that "if California law would allow punishment on this record, then the law is unconstitutionally vague as applied." Reply App. 33a-38a.

Respondents argue that this case is not certworthy because Ford is making an "as applied," rather than a facial challenge. Opp. 11. But these egregious problems recur regularly in product liability design cases and "there is no other context in which it is more important to ensure that punitive damages are not applied arbitrarily." PLAC Br. 3; *see also* Chamber Br. 9 ("the American business community has an acute interest in preventing the arbitrary imposition of punitive damages based on conduct that complies with reasonable objective guideposts for appropriate behavior").

Respondents also contend that, because Ford does not challenge the jury's award of compensatory liability, Ford "has no standing" to show how California's test for design defect interacts with its punitive damage statute. Opp. 12. But this makes no sense. Ford clearly has standing to challenge the application of such an amorphous and subjective defect "standard" as a predicate for a $55 million *punitive damage* award in the absence of other objective standards that would allow Ford to avoid punishment. *See* Pet. 11-15.

Although respondents claim that there is no vagueness problem here because Ford "knew" it *could* have made the Explorer safer if it had spent more money, Opp. 12-13, that is the very crux of the vagueness problem: "The unavoidable reality is that manufacturers are *always* aware that . . . their products could have been made even safer," and thus "in every products liability case[] a plaintiff will be able to offer 'proof'" of this. AAM/NAM Br. 18 (original emphasis). If this is all that is required for punitive damages, then "the law effectively provides no guidance on how a manufacturer can avoid such liability." PLAC Br. 8; *see also* Chamber Br. 4-6.

Finally, ignoring the many vagueness decisions cited by Ford, Pet. 10-11, 15-18, respondents assert that *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), and the plurality opinion in *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993), are "the relevant vagueness cases." Opp. 13.

But while *TXO* fleetingly referred to a vagueness issue, 509 U.S. at 465-466, both it and *Haslip* addressed only the due process challenges to the *amount* of punitive damages. *See id.* at 463, 465-466; *Haslip*, 499 U.S. at 24 n.12.[3]

B. Question 2—The Special Due Process Excessiveness Issues Posed By Product Design Cases.

1. Respondents also make the specious claim that Ford waived the due process excessiveness issue. Opp. 6-8. But Ford, having argued for pages that the Due Process Clause and California law prohibited the imposition of *any* punitive damages because its conduct was objectively reasonable, then declared that "[e]ven if liability for punitive damages were not otherwise precluded, the ***$75,000,000*** punitive judgment would have to be set aside in its entirety as grossly excessive [under] . . . the Due Process Clause." Reply App. 39a (original emphasis). When respondents argued in response that Ford's conduct was highly reprehensible, Ford replied: "[A]s discussed in detail above, Ford's good faith belief that its conduct was lawful was based on, among other things, its compliance with federal safety standards and industry custom, and significantly lessens any reprehensibility. *See BMW of N. Am., Inc.* v. *Gore* (1996) 517 U.S. 559, 565, 570-71, 577-78 (defendant's reliance on other state statutes authorizing the conduct at issue was reasonable and substantially mitigated reprehensibility)." Reply App. 45a. And the court of appeal analyzed the *State Farm/Gore* reprehensibil-

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[3] In fact, *Haslip* supports Ford by contrasting the more lenient due process review applicable to the *size* of a penalty with the more searching scrutiny used to address the imposition of liability in the first instance. *Id.* And to the extent California's statute on its face *appears* to provide a stringent punitive damage standard, Opp. 14, the stark disjunction between the facial and as-applied standards *increases* the due process problem. *See Bouie* v. *City of Columbia*, 378 U.S. 347, 353 (1964) (a "potentially greater deprivation of the right to fair notice . . . where . . . a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation").

ity guidepost in detail without giving any weight to the objective factors that Ford argued mitigated reprehensibility. Pet. App. 54a-57a.[4] This easily satisfies this Court's "pressed or passed upon" standard. *See, e.g., Kentucky* v. *Stincer*, 482 U.S. 730, 745 n.18, 747 n.22 (1987).[5]

2. Respondents' excursion into the "merits," Opp. 15-16, is misguided. They cannot dispute that this Court found the issue of how the excessiveness guideposts apply in the personal injury case to be certworthy—but did not resolve it—in *Philip Morris*. This issue has confused lower courts, which "treat[] all product-liability cases as if they fall on the high end of the reprehensibility spectrum merely because they involve physical harm, the design decisions at issue are 'intentional' rather than 'accidental,' and the jury necessarily found reckless disregard for safety as part of its threshold decision to impose punitive liability." PLAC Br. 11-12.

Similarly unavailing are respondents' strenuous attempts to distinguish *Clark* v. *Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006), and *In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006). Opp. 16-18. These cases contrast starkly with the court of appeal's dismissive treatment of the objective factors. Pet. 23-27. Despite the severe injuries in *Clark* (death), the Sixth Circuit found the existence of a reasonable disagreement to

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[4] Respondents assert that Ford's discussion of the excessiveness issue in its petition for review to the state-supreme court "never mentions the exclusion" of "industry custom," Opp. 7, but this also is false. Ford expressly argued that "the Court of Appeal failed to take into account the multiple objective factors – such as industry standards and custom . . .. Even if these factors do not completely bar punitive damages, they are relevant to gauging . . . reprehensibility. . . ."). Reply App. 12a.

[5] Respondents' complaints that Ford has expanded its arguments below are not only incorrect, but irrelevant. *Dewey* v. *Des Moines*, 173 U.S. 193, 197-198 (1899) (parties are entitled to "enlarge" upon arguments made below and "are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed"; *see also Stanley* v. *Illinois*, 405 U.S. 645, 658 & n.10 (1972).

be significant, militating against a finding of high reprehensibility. 436 F.3d at 603. And *In re Exxon Valdez* analyzed the "intent" factor very differently from the court here, which improperly conflated an intentional, lawful act (designing a motor vehicle) with an intent to cause injury. Pet. App. 57a.

C. Question 3—*Philip Morris* Requires, At A Minimum, Vacatur And Remand In This Case.

As Ford's Supplemental Brief shows, this case, from start to finish, was shot-through with improper invocations—over Ford's objections—of third-party harms as a basis for punishing Ford. Supp. Br. 4-8. In addition to arguing waiver yet again, respondents now sweepingly claim that "nothing in *Philip Morris* supports Ford's petition." Opp. 19. Both claims are, to put it bluntly, nonsense. Indeed, respondents' opposition, which labors for almost 15 pages to address *Philip Morris*, confirms that, at the very least, the California courts should address that decision's impact on this case in the first instance. *See Lawrence*, 516 U.S. at 167.

1. Ford amply preserved its argument that permitting reliance on injuries to third parties not before the court violates due process. Among other things, Ford moved *in limine* to exclude the Bronco II evidence implicating third-party harms, proposed relevant jury instructions, and moved to preclude respondents' improper arguments. *See* Supp. Br. 7-10. And, as respondents concede, Ford complained in the court of appeal "that Plaintiffs had asked the jury to punish it for Bronco II injuries suffered by non-parties." Opp. 8.[6]

Respondents argue that "Ford raised Bronco II-related jury arguments only in the part of its brief challenging the use of Bronco II evidence *as a matter of state law*." Opp. 8 (original emphasis). Respondents are plainly wrong. Ford

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[6] The record thus is much stronger than in *Philip Morris*, where "the sole objection . . . preserved was to the trial court's refusal to give defendant's requested charge." 127 S. Ct. at 1068 (Ginsburg, J., dissenting).

expressly argued that the Bronco II evidence and argument was improper "because due process forbids imposing punitive damages against a defendant for conduct other than the specific conduct that harmed the plaintiffs before the court." Reply App. 30a-31a (citing *State Farm*, 538 U.S. at 423). And Ford specifically cited a California Supreme Court decision interpreting *State Farm* on this point, and argued that Ford had impermissibly been *directly* punished for alleged third-party harms. *Id.* at 31a n.4 (citing *Johnson* v. *Ford Motor Co.*, 35 Cal. 4th 1191, 1206 n.6 (2005)); *see also id.* at 45a. In fact, Ford's introduction to this section "underscored . . . the serious due process implications of preventing a defendant facing unprecedented punishment from presenting relevant evidence in its defense . . . and allowing irrelevant and improper evidence to be used in support of such punishment." Reply App. 28a (citing, inter alia, *State Farm*, 538 U.S. at 423). This Court made precisely this point in *Philip Morris*. 127 S. Ct. at 1063; *see also* Supp. Br. 6 n.1.

Respondents belatedly contend that Ford failed to preserve this issue by not objecting to respondents' improper argument at trial. Opp. 8. But they did not make this argument below and the court of appeal rejected Ford's claims on the merits. Pet. App. 17a-20a. Respondents ignore Ford's motion in limine *specifically seeking to bar such arguments*, Supp. Br. 8, which preserved Ford's objections. *See People v. Wharton*, 53 Cal.3d 522, 549 n.3 (1991).[7]

Respondents assert that "the mass-marketing as repeated misconduct, or indeed the imposition of punishment based in any way on third-party injuries, is one of the few issues that Ford's 68-page Petition for Rehearing did *not* raise." Opp. 10 (original emphasis). This, too, is false. Ford's rehearing petition expressly argued that the decision below "flatly vio-

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[7] Respondents cite no authority for their meritless claim that Ford's proposal of alternative instructions on third party harm waives a challenge to improper evidence and argument. Opp. 8, 28-29.

lates *State Farm* . . . because the Court is punishing Ford for its conduct as to third parties not before the Court and 'hypothetical claims' of those third parties." Reply App. 20a; *see also id.* 21a-22a.[8] Thus, Ford's third-party harm arguments were pressed and passed upon below and properly preserved. *See Taylor* v. *Kentucky*, 436 U.S. 478, 483 & n.10 (1978).

2. The volume and intensity of respondents' efforts to avoid the implications of *Philip Morris* itself demonstrates that the Court should, at a minimum, grant, vacate, and remand this case. There is plainly a "reasonable probability" that the lower courts on remand would find that *Philip Morris* alters the result, *Lawrence*, 516 U.S. at 167.

Respondents urged the jury to punish Ford for alleged harms to third parties in a manner virtually identical to that which the Court rejected in *Philip Morris*. *See* Supp. Br. 6-7. Indeed, respondents expressly *concede* that the "block-quoted passage" in which they urged the jury to impose punitive damages "does refer to the Bronco II having killed or injured many people." Opp. 26. This is tantamount to an admission that they directly and improperly appealed to the jury to punish Ford for alleged harms to third parties. Although respondents now astonishingly assert that they never suggested that anyone else was actually *injured* by the design of the Bronco II or Explorer, Opp. 24-26, this strained and *post hoc* parsing of fragments of the record is, mildly put, unpersuasive. Even now respondents cannot stop themselves from trying to tar Ford with other cases involving different vehicles and third parties with unrelated injuries. Opp. 12.[9]

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[8] The third-party harm issue was expressly included within Issue 3 in Ford's Petition For Review in the California Supreme Court and addressed at numerous junctures. Reply App. 3a, 5a, 12a-13a.

[9] Respondents claim there was no actual *evidence* regarding third party harm, as opposed to improper, unsupported argument, Opp. 9, 24-25, but this is a *more* egregious due process violation, not less. *Philip Morris*, 127 S. Ct. at 1063 ("[T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages

Finally, respondents claim that "[w]hat most matters . . . is not passages in a trial transcript but the text of the published appellate opinion allegedly creating confusion or conflict in the law." Opp. 22. But *Philip Morris* makes clear that Ford was entitled to procedural protections—which it asked for but was denied—precluding punishment based on alleged third-party harms. Supp. Br. 1-3. The court of appeal rejected Ford's arguments, and respondents have previously acknowledged that the court was punishing Ford for harms to other parties resulting from sales of other vehicles. Pet. App. 107a, 55a-57a. Respondents argue that because the court analyzed the third party evidence under the rubric of "reprehensibility," there is no constitutional problem. Opp. 22-24. But this was true of the opinion *Philip Morris* reversed. 127 S. Ct. at 1064-1065. Because the Due Process Clause forbids "a jury to base [a punitive damage] award *in part* upon its desire to *punish* the defendant for harming persons who are not before the court," *id.* at 1060 (first emphasis added), and "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring," *id.* at 1065, any ambiguity on the precise use of alleged third-party harms below requires vacatur and remand. *See Henry* v. *City of Rock Hill*, 376 U.S. 776, 776 (1964) (remand proper if "not certain that the case [is] free from all obstacles to reversal on an intervening precedent").

[Footnote continued from previous page]

equation. . . . The trial will not likely answer such questions as to non-party victims. The jury will be left to speculate."). And respondents did elicit testimony about other Explorer and Bronco II cases, including those that "involved people getting hurt or killed," RT 7963, and asked a Ford expert if he had examined the "data of the people that have been brain damaged, quadriplegia, paraplegia in Ford rollover accidents," supposedly contained on disks counsel "represented[ed were] evidence in this case" and that "would take you several hundred hours to go through." RT 7961. Respondents also introduced evidence on the Bronco II's *fatal* rollover rate, *see, e.g.*, 1265-1266, calling this its "death record." RT 669.

Respectfully submitted.

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